

CHAPTER 18

COMBATING TERRORISM

REFERENCES

1. 1944 Chicago Convention on International Civil Aviation, (international standards for safeguarding civil aircraft), 14 C.F.R. 107-108.
2. 1963 Tokyo Convention on Offenses and Certain Other Offenses Committed on Board Aircraft, P.L. 91-449; 84 Stat. 921.
3. 1970 Hague Convention for the Unlawful Seizure of Aircraft, see Anti-Hijacking Act of 1974, P.L. 93-366, 49 U.S.C. App. §§ 1472 (i-n).
4. 1971 Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Aircraft, (covers acts of sabotage such as bombings aboard aircraft while in flight), see Comprehensive Crime Control Act of 1984, P.L. 98-473, 18 U.S.C. § 32.
5. 1971 Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion That Are of International Significance, 27 UST 3949; TIAS 8413.
6. 1973 Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, (protects senior government officials and diplomats), see P.L. 94-467, 18 U.S.C., §§ 112, 1116, 878, 1201 (a) (4).
7. Convention on the Physical Protection of Nuclear Material, P.L. 97-351 18 U.S.C. § 831.
8. 1979 International Convention Against the Taking of Hostages, P.L. 98-473 18 U.S.C. § 1203.
9. 1988 Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Aviation, which supplements the 1971 Montreal Convention on Civil Aviation Safety by extending coverage to airports and aircraft on the ground, Sec. 60021 of the Violent Crime Control and Law Enforcement Act of 1994, P.L. 103-322.
10. 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Sec. 60019 of the Violent Crime Control and Law Enforcement Act of 1994, P.L. 103-322. The U.S. subsequently deposited its instruments of ratification for the maritime and airports conventions Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf
11. The 1991 Convention on the Marking of Plastic Explosives for the Purposes of Detection (signed in Montreal in March, 1991) but not yet in force. The U.S. Senate gave its advice and consent in November, 1993. The implementing legislation passed the Senate on June 7, 1995 as part of the Omnibus Counterterrorism Bill, and is contained in the pending House of Representatives version.
12. 1997 International Convention for the Suppression of Terrorist Bombings. Signed by the U.S. on January 18, 1998, submitted to the Senate for advice and consent to ratification on September 8, 1998.
13. 1999 International Convention for the Suppression of Financing Terrorism. Signed by the U.S. on January 10, 2000, submitted to the Senate for advice and consent to ratification on October 12, 2000.
14. 10 U.S.C. et seq., Armed Forces
15. 10 U.S.C. § 371-382, Military Support to Law Enforcement
16. 10 U.S.C. §§ 331-334, Insurrections
17. 14 U.S.C. § 712, U.S. Coast Guard
18. 18 U.S.C. § 1385, Posse Comitatus Act
19. 32 U.S.C. § 112, Drug Interdiction and Counter Drug Activities
20. 42 U.S.C. §§ 5121-5204c, Stafford Act
21. 50 U.S.C. §§ 401-441d, National Security Act
22. 50 U.S.C. § 413, Intelligence Oversight Act of 1980
23. 50 U.S.C. §§ 2311- 2367, Weapons of Mass Destruction Act of 1996
24. 50 U.S.C. §§ 2251-2303, Civil Defense Act
25. National Defense Authorization Act for Fiscal Year 1991, P.L. 101-510, Section 1004, Additional Support for Counter Drug Activities

26. National Defense Authorization Act for Fiscal Year 1997, P.L. 104-201, Section 1031, Authority to Provide Additional Support for Counter-Drug Activities of Mexico
27. Authorization for Use of Force, 2001, P.L. 107-40, Authority for the Use of the U.S. Armed Forces Against Those Responsible for the September 11 Attacks Against the U.S.
28. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, P.L. 107-56, Authority to Deter and Punish Terrorists Acts in the U.S. and Abroad, and to Enhance Law Enforcement Investigative Tools
29. Aviation and Transportation Security Act, 2001, P.L. 107-71
30. Intelligence Authorization Act of Fiscal Year 2002, P.L. 107-108
31. National Defense Authorization Act for Fiscal Year 2002, P.L. 107-107, Authority to Provide Additional Support for Activities Relating to Combating Terrorism
32. E.O. 12148, Federal Emergency Management
33. E.O. 12333, U.S. Intelligence Activities
34. E.O. 12472, Assignment of National Security and Emergency Telecommunications Functions
35. E.O. 12656, Assignment of Emergency Preparedness Responsibilities
36. E.O. 13010, Critical Infrastructure Protection
37. E.O. 13099, Naming al-Qaida as an FTO
38. E.O. 13129, Blocking Taliban assets
39. E.O. 13223, Ordering the Ready Reserve to Active Duty
40. E.O. 13224, Freezing Assets of 27 organizations/persons linked to al-Qaida
41. E.O. 13228, Establishing Office of Homeland Security
42. E.O. 13231, Critical Infrastructure
43. NSD 66, Civil Defense
44. PDD 39, U.S. Policy on Counterterrorism (Unclassified Extract)
45. PDD 62, Combating Terrorism
46. PDD 63, Critical Infrastructure Protection
47. President Clinton, *A National Security Strategy for a New Century*, October 1998.
48. NSDP-1, Organization of the Security Council (February, 2001)
49. Military Order, Authorizing the Establishment of Military Commissions (November 13, 2001)
50. DoDD 2000.12, *DoD Combating Terrorism Program*
51. DoDD 2000.14, Draft, *DoD Combating Terrorism Program Procedures*
52. DoDD O-2000.12H, *Protection of DoD Personnel and Activities Against Acts of Terrorism and Political Turbulence*
53. DoDI, O-2000.16, *DoD Combating Terrorism Program Standards*
54. DoDD 3020.26, *Continuity of Operations, Policies and Planning*
55. DoDD 3020.36, *Assignment of National Security*
56. DoDD 3025.1, *Military Support to Civil Authorities*
57. DoDD 3025.12, *Military Support to Civil Disturbances*
58. DoDM 3025.1M, *Manual for Civil Emergencies*
59. DoDD 3150.5, *DoD Response to Improvised Nuclear Device*
60. DoDD 3150.8, *DoD Response to Radiological Incidents*
61. DoDD 4000.19, *Interservice and Intergovernmental Support*
62. DoDM 5100.52M, *Nuclear Weapon Accident Response Procedures*
63. DoDD 5160.54, *DoD Key Asset Protection Plan*
64. DoDM C-5210.41-M, *Nuclear Weapons Safety Manual*
65. DoDD 5210.84, *Security of DoD Personnel at U.S. Missions Abroad*
66. DoDD 5240.1, *DoD Intelligence Activities*
67. DoDD 5240.1-R, *Procedures Governing the Activities of DoD Intelligence Components that Affect United States Persons*
68. DoDD 5240.6, *Counterintelligence Awareness and Briefing Program*
69. DoDD 5525.5, *DoD Cooperation with Law Enforcement Officials*
70. CJCSI 3710.01, *Operational Support to Drug Law Enforcement Agencies*
71. CJCSI 5261.01A, *Combating Terrorism Readiness Initiatives Fund*
72. CJCSI 5262.01, *Combating Terrorism Technology Request Process*
73. DoD Civil Disturbance Plan, GARDEN PLOT

74. DoD Report to Congress, *Domestic Preparedness Program in the Defense Against Weapons of Mass Destruction*, May 1, 1997
75. DoD Plan for Integrating National Guard and Reserve Component Support for Response to Attacks Using Weapons of Mass Destruction, January 1, 1998.
76. Joint Pub 2-0, Doctrine for Intelligence Support for Joint Operations
77. Joint Pub 3-05, Doctrine for Joint Operations
78. Joint Pub 3-05.3, Joint Special Operations Operational Procedures
79. Joint Pub 3-07.2, Joint Tactics, Techniques, and Procedures for Antiterrorism
80. Joint Pub 3-07.7, Joint Tactics, Techniques, and Procedures for Domestic Support Operations
81. Joint Pub 3-10.1, Joint Tactics, Techniques, and Procedures for Base Defense
82. Joint Pub 3-54, Joint Doctrine for Operations Security
83. AR 381-10, U.S. Army Intelligence Activities
84. NGR 500-1/ANGI 10-8101, Military Support to Civil Authorities
85. NGB 500-2/ANGI 10-801, National Guard Counterdrug Support to Law Enforcement
86. AR 500-51, Support to Civilian Law Enforcement
87. AR 700-131, Loan and Lease of Army Material
88. SECNAVINST 5820.7B, Cooperation with Civilian Law Enforcement Officials
89. OPNAVINST 3440.16C, Navy Civil Emergency Management
90. AFI 10-801, Air Force Assistance to Civilian Law Enforcement Officials
91. AFI 10-802, Military Support to Civil Authorities
92. AFI 31-202, Working Dog Program
93. FM 100-19, Domestic Support Operations

INTRODUCTION

On September 11, 2001, the world changed. The unprecedented terrorist attacks against the United States on that day clearly demonstrated to the international community the depth and scope of global terrorism. The terrorist attacks in New York, Washington, and Pennsylvania also undoubtedly demonstrated the terrorists' willingness and ability to target both civilians, as well as military objects here at home and abroad. Furthermore, the attacks unmistakably verified that the changing face of terrorism continues to evolve into organizations willing to inflict mass casualties. Historically, terrorist attacks were politically motivated and did not typically involve mass casualties. The terrorist organizations of the 70's and 80's were mainly state sponsored, characterized as having leftist political agendas and avoided mass casualties. With the disintegration of the Soviet Union and the decline of communism, there has been a major shift of terrorists' motives and tactics. Today, religious and ethnic fanaticism continues to rise. In many cases, today's terrorists view violence as a divinely inspired act. These terrorists believe they are complying with "God's" law and seemingly have no regard for the laws of man. Additionally, the availability of conventional weapons and the proliferation of technologies of WMD and increased access to information technology provide today's terrorist organizations with the means to carry out their deadly terror campaign. Furthermore, their methods have been increasingly lethal in the sense that they are more willing to inflict mass casualties. This lethal combination of changing motives, means, and methods of today's terrorist organizations culminated with the attacks on the World Trade Center Towers and the Pentagon.

The September 11th attacks clearly placed global terrorism on center-stage, both domestically and internationally. This focus on global terrorism has resulted in a close examination on how to combat global terrorism. As the world is discovering since the September 11th attacks, combating terrorism, particularly terrorism from non-state organizations such as the al-Qaida network, does not fit neatly into any existing paradigms. The current military operation against the al-Qaida terrorist group in Afghanistan is not the traditional type of armed conflict contemplated by the drafters of existing law of war conventions. Since September 11th, many issues and questions have been raised and many remain unresolved. As of this publication, the manner in which the United States and the international community is combating terrorism is still evolving. One thing is clear however; the United States is leading an unprecedented worldwide campaign against global terrorism, wherever it exists.

The international response has been swift and unprecedented. In the United Nations on the day after the attacks, the General Assembly and the Security Council both passed resolutions regarding global terrorism. Additionally, on September 28, 2001, The U.N. Security Council unanimously adopted UNSCR 1373 under Chapter VII of the U.N.

Charter. UNSCR 1373 is extremely significant in that it established a body of legally binding obligations on all U.N. member states. It also defines the common core of the new international campaign to combat international terrorists, their organizations, and those who support them. Furthermore, UNSCR 1373 also called for the establishment of a Counter Terrorist Committee to ensure full implementation by all states. Other examples of international cooperation on the current war on terrorism include: 136 countries offering a diverse range of military assistance, with 17 countries having forces deployed in the Afghanistan region; 46 multilateral organizations declaring their support; and 142 countries acting to freeze terrorist assets.

Domestically, the United States has taken a broad range of steps to combat terrorism since September 11th. The President has implemented a comprehensive foreign policy against global terrorism. This policy includes putting the world on notice that any nation that harbors or supports terrorism will be regarded as a hostile regime. The administration has spearheaded the worldwide coalition against terrorism utilizing all available diplomatic, financial, law enforcement, intelligence and military means. The creation of the Office of Homeland Security and the Homeland Security Council were established to help protect against future terrorist attacks. There has been a flurry of legislation passed by Congress including the Authorization for Use of Force and the “Patriot Act”. As of this publication, Operation Enduring Freedom continues with its unprecedented use of military force against global terrorism.

The purpose of this chapter is to assist the judge advocate in understanding DoD’s role in combating terrorism. Clearly, Operation Enduring Freedom is an obvious example of DoD’s role combating terrorism. Yet, DoD’s role in combating terrorism is much broader than the use of military force and therefore the remainder of the chapter will focus mainly on DoD’s role in supporting the U.S. effort in these other areas in combating terrorism. It should be noted however that, as of this publication, it is still unclear what effect the September 11 attacks will eventually have on DoD’s role in combating terrorism. The manner the U.S. and the international community combats terrorism is literally changing day-to-day. There is little doubt that DoD’s role, as well as other agencies’ roles, will significantly evolve in the coming months and years as a result of September 11. Even before September 11, there were several recent studies that propose a greater role for the U.S. military in combating terrorism. Therefore, some of the material in this chapter is expected to be outdated relatively soon.

The Department of Defense (DoD) is not the lead agency for combating terrorism. However, DoD does play a significant supporting role in several areas. DoD is responsible for providing technical assistance or forces when requested by the President of the United States and/or the Secretary of Defense. Moreover, DoD is also responsible for protecting its own personnel, bases, ships, deployed forces, equipment and installations. Every commander at every level has the inherent responsibility of planning for and defending against terrorist attacks. Similarly, every servicemember, family member, and DoD Civilian, contractor and host nation laborer should be educated and alerted to possible terrorist attacks. The Command Judge Advocate should participate in all foreign and domestic antiterrorism plans and in the implementation of those plans. Command Judge Advocates assigned to units involved in counterterrorism should have a thorough understanding of the unit’s plans and missions.

“Terrorism” is defined in DoD Dir. 2000.12 as the “calculated use of violence or threat of violence to inculcate fear; intended to coerce or to intimidate governments or societies in the pursuit of goals that are generally political, religious, or ideological.” The term combating terrorism involves both Counterterrorism and Antiterrorism.

Counterterrorism (CT) generally refers to offensive military operations designed to prevent, deter, and respond to terrorism. It is a highly specialized, resource intensive military activity. Certain national special operations forces units are prepared to execute these missions on order of the President or SECDEF. Combatant commanders maintain designated CT contingency forces when national assets are not available. These programs are sensitive, normally compartmented, and addressed in relevant National Security Decision Directives, National Security Directives, contingency plans and other classified documents. Therefore, this subject is beyond the scope of this publication.

Antiterrorism (AT) consists of defensive measures to reduce the vulnerability of individuals and property to terrorist attacks. Overseas (OCONUS), AT should be an integrated and comprehensive plan within each combatant command. The AT plan is normally thought of in two primary phases; proactive and reactive. The proactive phase includes the planning, resourcing, preventive measures, preparation, awareness, education, and training prior to an incident. The reactive phase includes the crisis management actions in response to an attack. In the continental

United States (CONUS), DoD role is generally that of providing expert technical support in the area of consequence management.

JUDGE ADVOCATE INVOLVEMENT

As a member of the Crisis Management Team, the judge advocate must provide essentially the same kind of legal advice to the commander of a force deployed overseas as he would provide in the event of a terrorist incident occurring at a CONUS installation. The unit must be prepared to defend itself, and legal questions, such as limitations, if any, on the use of force, and on the use of deadly force, as well as the question of who may exercise jurisdiction over a particular incident, are issues that must be addressed prior to deployment.

The commander of a deployed unit, in addition to providing for force security and terrorism counteraction, must ensure that the soldiers are operating under clear, concise rules of engagement, regardless of the deployment location. Soldiers must be aware of their right to defend themselves, even while participating in a peacetime exercise. They must also be aware, however, of any restraints on the use of force. Note that the CJCS SROE include “any force or terrorist unit (civilian, paramilitary, or military)” within the definition of “Hostile Force.”

Judge advocates advising units involved in counterterrorism operations should be particularly cognizant of issues concerning: use of force/ROE, weapons selection and employment, collateral damage, defense of third parties, targeting (determination of proper targets), and terminology (response, reprisal, self-defense, and anticipatory self-defense). PDD 39 and PDD 62 should be reviewed.

FEDERAL AGENCY ROLES IN COMBATING TERRORISM

Overview. The primary Federal organizations dealing with terrorism management are the National Security Council (NSC), the Department of State (DoS), and the Department of Justice (DoJ).

The National Security Council. The NSC formulates U.S. policy for the President on terrorist threats that endanger U.S. interests.

NSC’s Counterterrorism & National Preparedness Policy Coordination Committee. NSDP-1 establishes this committee. (NSPD-1 establishes the organization of the NSC under the Bush Administration. NSPD-1 abolishes the previous system of interagency working groups and replaces them with a policy coordination committee (PCC)). This committee is comprised of representatives from State, Justice, DoD, CJCS, CIA and FBI. The PCC has four standing subordinate groups to coordinate policy on specific areas relating to responding to terrorism. When the NSC is advised of the threat of a terrorist incident or actual event, the appropriate subordinate group will convene to formulate recommendations for the Counterterrorism and Preparedness PCC who in turn will provide policy analysis for the Deputies Committee. The Deputies Committee then ensures that the issues brought before the Principals Committee and NSC are properly analyzed and prepared for a decision by the President.

Department of State. DoS is the lead agency for responses to terrorism that takes place outside the United States, other than incidents on U.S. flag vessels in international waters. Due to a Memorandum of Understanding between DoS and DoD, DoD has responsibility for terrorism against U.S. interests on the Arabian Peninsula. Once military force is directed, the President and SECDEF exercise control of the U.S. military force.

Department of Justice. DoJ is normally responsible for overseeing the Federal response to acts of terrorism within the U.S. The U.S. Attorney General, through an appointed Deputy Attorney General, makes major policy decisions and legal judgments related to each terrorist incident as it occurs. In domestic terrorism incidents the AG will have authorization to direct a FBI-led DEST (Domestic Emergency Support Team) an ad hoc collection of interagency experts.

Federal Bureau of Investigation. The FBI has been designated the primary operational agency for the management of terrorist incidents occurring within the U.S. When a terrorist incident occurs, the lead official is generally the Special Agent in Charge (SAC) of the field office nearest the incident under supervision of the Director of the FBI. The FBI maintains liaison at each governor’s office. Because of the presence of concurrent jurisdiction in many

cases, the FBI cooperates with state and local law enforcement authorities on a continuing basis. In accordance with the Atomic Energy Act of 1954, the FBI is the agency responsible for investigating a threat involving the misuse of a nuclear weapon, special nuclear material, or dangerous radioactive material. For an emergency involving terrorism or terrorist acts involving chemical or biological weapons of mass destruction the FBI also has the lead. In these efforts, the FBI coordinates with the Departments of Energy, DoD, the Nuclear Regulatory Commission, and the Environmental Protection Agency as well as several states that have established nuclear, chemical & biological and/or weapons of mass destruction threat emergency response plans.

Department of Energy. DoE has important national security responsibilities. The Office of Defense Programs maintains the safety, security and reliability of U.S. nuclear weapons stockpile, without underground nuclear testing. The Office of Emergency Responses is prepared to respond to any nuclear or radiological accident or incident anywhere in the world. There are seven sub-offices with the Office of Emergency Responses.

Department of Transportation. DoT and/or FAA are the federal agencies responsible for responding to terrorist incidents on aircraft in flight within U.S. jurisdiction. The FAA has exclusive responsibility in instances of air piracy for the coordination of law enforcement responses. The FBI maintains procedures, in coordination with DoS and DoT, to ensure efficient resolution of terrorist hijackings. DoT, through the USCG, is responsible for reducing risk of maritime terrorist acts within the territorial seas of the United States. The USCG and FBI have an interagency agreement and cooperate when coordinating counterterrorism activities. (USCG Commandant Instruction 16202.3a).

Department of the Treasury. The Department of the Treasury is responsible for preventing unlawful traffic in firearms and explosives, and by protecting the President and other officials from terrorist attacks.

The Director, Central Intelligence. DCI is the lead in the Intelligence Community for reducing vulnerabilities through aggressive foreign intelligence collection, analysis, counterintelligence, and covert action in accordance with the National Security Act of 1947 and E.O. 12333.

Federal Emergency Management Agency. In the event of a terrorist WMD attack, FEMA manages the support provided by other agencies and the coordination with state and local authorities. FEMA relies on the Federal Response Plan to coordinate support for consequence management.

Office of Homeland Security. On October 8, 2001, President Bush signed E.O. 13228 establishing the Office of Homeland Security and the Homeland Security Council. The mission of the Office shall be to develop and coordinate a comprehensive national strategy to strengthen the current protections against terrorist threats and attacks in the United States. The Office will coordinate federal, state, and local counterterrorism efforts. With the exception of defending against direct attack, providing direct attack deterrence, and protecting critical national defense assets, DoD's role in Homeland Security should primarily involve providing military forces in support of civilian federal, state, and local agencies. Prior to the establishment of the Office of Homeland Security, FEMA was generally the lead agency in Consequence Management operations. As of this publication, how the Office of Homeland Security will impact the roles of the other agencies remains unclear. Chapter 24 provides a more detailed discussion regarding Homeland Security.

Department of Defense. U.S. Armed forces are prepared, on order, to attack terrorists or states involved in sponsoring terrorism. DoD Directive 2000.12 now prescribes that the Assistant Secretary of Defense (Special Operations and Low Intensity Conflict - ASD-SO/LIC) has the lead role within the Department of Defense in countering domestic terrorist incidents where U.S. forces may be used. The Nunn-Lugar Bill calls for the military to maintain at least one domestic terrorism rapid response team composed of members of the Armed Forces and employees of DoD with the appropriate expertise. Active Duty, National Guard, and Reserve forces possess expertise, training, and equipment that can support responses to chemical, biological, and radiological attacks at DoD installations and civilian communities. Expert and capable technical organizations and tactical units such as Explosive Ordnance Disposal (EOD) teams, the Marine Corps Chemical Biological Incident Response Force (CBIRF), and the Army's Technical Escort Unit (TEU) are involved in the development of response plans and procedures. These units can assist the FBI on-site in dealing with chemical and biological incidents, such as identification of contaminants, sample collection and analysis, limited decontamination, medical diagnosis and treatment of casualties and render safe procedure for WMD devices. DOMS will serve as the executive agent for all

domestic consequence support. However, the Attorney General, through the FBI, will remain responsible for coordinating :

1. The activities of all Federal agencies assisting in the resolution of the incident and in the administration of justice in the affected areas.
2. These activities with those state and local agencies similarly engaged.

For the military planner in the United States, its territories and possessions, this relationship between DoJ and the DoD requires the development of local memorandums of agreement, or understanding, between the installation, base, unit or port, and the appropriate local FBI office. This precludes confusion in the event of an incident. These local agreements, because of military turnover and reorganization, should be reviewed and tested annually.

Military Authority. Upon notification of Presidential approval to use military force, the Attorney General will advise the Director of the FBI who will notify the SAC at the terrorist incident scene. Concurrently the SECDEF will notify the on-scene military commander. Nothing precludes the presence of the military liaison to respond and keep the military chain of command informed. The military commander and the SAC will coordinate the transfer of operational control to the military commander. Responsibility for the tactical phase of the operation is transferred to military authority when the SAC relinquished command and control of the operation and the on-site military commander accepts it. However, the SAC may revoke the military force commitment at any time before the assault phase if the SAC determines that military intervention is no longer required and accomplished without seriously endangering the safety of military personnel or others involve in the operation. When the military commander determines that the operation is complete and military personnel are no longer in danger, command and control will be promptly returned to the SAC.

AUTHORITY

Criminal Actions. Most terrorist acts are federal crimes whether committed during peacetime or in military operations. Terrorists, by definition, do not meet the four requirements necessary for combatant status: (wear uniforms or other distinctive insignia, carry arms openly, be under command of a person responsible for group actions, and conduct their operations in accordance with the laws of war). Only combatants can legitimately attack proper military targets. For this reason, captured terrorists are not afforded the protection from criminal prosecution attendant to prisoner of war status. However, common article 3 of the 1949 Geneva Conventions, which requires that noncombatants be treated in a humane manner, also applies to captured terrorists.

Jurisdiction. In peacetime military operations, most terrorist acts are federal crimes. This is also true in police actions to maintain a legitimate government. However, in an internationally recognized war or hostilities short of war (regional or global), terrorists can be tried under local criminal law or under military jurisdiction by either a court-martial or military commission. A commander's authority to enforce security measures to protect persons and property is paramount during any level of conflict. Commanders must coordinate with their legal advisers to determine the extent of their authority to combat terrorism.

CONSTITUTIONAL AND STATUTORY GUIDANCE

The fundamental restriction on the use of the military in law enforcement is contained in the Posse Comitatus Act (PCA), which is discussed at length in Chapter 19, Domestic Operations. However, several of the exceptions to the PCA are relevant to DoD's contribution to the fight against terrorism. A discussion of the exceptions follows:

Constitutional Exceptions: The President, based on his inherent authority as the Executive, has the authority to use the military in cases of emergency and to protect federal functions and property. Military commanders, by extension of this authority, may respond in such cases as well (Immediate Response Authority). In the case of civil disturbances, which may result from a terrorist act, military commanders may rely on this authority, which is contained in DoD Directive 3025.12.

Generally, to cope with domestic emergencies and to protect public safety an Emergency Rule has evolved: When the calamity or extreme emergency renders it dangerous to wait for instructions from the proper military department, a commander may take whatever action the circumstances reasonably justify. However, the commander must comply with the following:

1. Report the military response to higher headquarters, e.g. in the Army, the Director of Military Support (DOMS) at HQDA, DCSOPS should be contacted.
2. Document all facts and surrounding circumstances to meet any subsequent challenge of impropriety.
3. Retain military response under the military chain of command.
4. Limit military involvement to the minimum demanded by necessity.
5. Emergency situations include, but are not limited to, the following:
 - (a) Providing civilian or mixed civilian and military fire-fighting assistance where base fire departments have mutual aid agreements with nearby civilian communities.
 - (b) Providing emergency explosion ordnance disposal (EOD) service.
 - (c) Using military working dog (MWD) teams in an emergency to aid in locating lost persons (humanitarian acts) or explosive devices (domestic emergencies).

Statutory Exceptions: 10 U.S.C. §§ 331-334 are the primary statutory exceptions pertinent to terrorism scenarios. A terrorist incident may well qualify as a civil disturbance. Triggering these statutes permits the active component to take on law enforcement function, subject to the policy considerations discussed in the preceding section. Federalization of the National Guard, in such a case, will not affect the Guard's functioning as they would, obviously, not be excepted from the PCA as well. For more information on these statutes, see the preceding section. In addition, some lesser-known statutes contain exceptions to the PCA:

1. To assist the Department of Justice in cases of offenses against the President, Vice President, members of Congress, the Cabinet, a Supreme Court Justice, or an "internationally protected person." 18 U.S.C. §§ 351, 1116, 1751.
2. To assist the Department of Justice in enforcing 18 U.S.C. § 831, dealing with prohibited transactions involving nuclear materials. This statute specifically authorizes the use of DoD assets to conduct arrests and searches and seizures with respect to violations of the statute in cases of "emergency," as defined by the statute.
3. 18 U.S.C. § 382 allows DoD to assist the Department of Justice in enforcing 18 U.S.C. § 175 & 2332, during an emergency situation involving chemical or biological weapons of mass destruction. DoD support in WMD situations also appears in 50 U.S.C. §§ 2311- 2367, Weapons of Mass Destruction Act of 1996. These statutes specifically authorize the use of DoD assets and in **very limited** situations provide authorization for DoD to arrest, search and seize.

Vicarious Liability. Commanders at all echelons should be aware of the legal principle of vicarious liability in planning and implementing antiterrorist measures. This principle imposes indirect legal responsibility upon commanders for the acts of subordinates or agents. For example, willful failure on the part of the commander or a subordinate to maintain a trained and ready reaction force as required by regulation, could be construed as an act taking the commander out of the protected position found in being an employee of the Federal Government; thus making the commander subject to a civil suit by any hostages injured. Civil or criminal personal liability may result from unlawful acts, negligence, or failure to comply with statutory guidance by subordinates or agents. With the increasing number of civilian contract personnel on military installations and the sophistication of terrorist organizations, commanders should pay particular attention to meeting regulatory requirements and operating within the scope of their authority. The legal principle of vicarious liability, long established in the civilian community, has

only recently applied to the military community. In this light, the command legal adviser has become increasingly important to the commander in planning, training and operational phases of the antiterrorist program.

JURISDICTION AND AUTHORITY FOR HANDLING TERRORIST INCIDENTS

Jurisdiction Status of Federal Property. In determining whether a Federal or state law is violated, it is necessary to look not only to the substance of the offense but also to where the offense occurs. In many cases, the location of the offense will determine whether the state or Federal Government will have jurisdiction to investigate and prosecute violations. There are four categories of Federal territorial jurisdiction: exclusive, concurrent, partial, and proprietary.

1. Exclusive jurisdiction means that the Federal Government has received, by whatever method, all of the authority of the state, with no reservations made to the state except the right to serve criminal and civil process. In territory that is under the exclusive jurisdiction of the United States, a state has no authority to investigate or prosecute violations of state law. The Assimilative Crimes Act, 18 U.S.C. § 13, however, allows the Federal Government to investigate and prosecute violations of state law that occur within the special maritime and territorial jurisdiction of the United States.

2. Concurrent jurisdiction means that the United States and the state each have the right to exercise the same authority over the land, including the right to prosecute for crimes. In territory that is under the concurrent jurisdiction of the United States and a state, both sovereigns have the authority to investigate or prosecute violations of their respective laws. In addition, the Federal Government may prosecute violations of state law under the Assimilative Crimes Act.

3. Partial jurisdiction refers to territory where the U.S. exercises some authority and the state exercises some authority beyond the right to serve criminal and civil process, usually the right to tax private parties. In territory that is under the partial jurisdiction of the United States, a state has no authority to investigate or prosecute violations of state law, unless that authority is expressly reserved. The Federal Government may, however, prosecute violations of state law under the Assimilate Crimes Act.

4. Proprietary jurisdiction means that the United States has acquired an interest in, or title to, property but has no legislative jurisdiction over it. In territory that is under the proprietary jurisdiction of the United States, the United States has the authority to investigate and prosecute non-territory-based Federal offenses committed on such property, such as assault on a Federal officer. This authority does not extend to investigations and prosecution of violations of state laws under the Assimilative Crimes Act and Federal Crimes Act of 1970. The state has the authority to investigate and prosecute violations of state law that occur on such territory.

Federal Authority. Several Federal criminal statutes apply to terrorist activities committed in the U.S. or against U.S. nationals or interests abroad. Some deal with conduct that is peculiar to terrorism, for example, 18 U.S.C. § 2332 prohibiting murder or assault of U.S. nationals overseas, when the AG certifies that the crime was intended to coerce, intimidate, or retaliate against a civilian population. Other federal statutes prescribe conduct that is a crime for anyone but in which a terrorist may engage to accomplish his purposes, for example, 18 U.S.C. § 32 (destruction of aircraft or aircraft facilities, 18 U.S.C. § 1203 (hostage taking), and 49 U.S.C. § 46502 (aircraft piracy). The Assimilative Crimes Act, finally, will allow the Federal Government to investigate and prosecute violations of state law regarding terrorist acts or threats that occur within the exclusive concurrent, or partial jurisdiction of the United States, thereby giving the Federal Government investigative and prosecutorial jurisdiction over a wide range of criminal acts. Once a violation of Federal law occurs, the investigative and law enforcement resources of the FBI and other Federal enforcement agencies become available, and prosecution for the offense may proceed through the Office of the United States Attorney.

Federal and State Concurrent Authority. In some cases, terrorist acts may be violations of state law as well as Federal Law. In the situation, both state and Federal enforcement authorities have power under their respective criminal codes to investigate the offense and to institute criminal proceedings. If a terrorist act is a violation of both Federal and state law, then the Federal Government can either act or defer to the state authorities depending on the nature of the incident and the capabilities of local authorities. Even where the Federal Government defers to state authorities, it can provide law enforcement assistance and support to local authorities on request. The prosecuting

authority makes the choice between Federal or state action. However, successive prosecutions are possible even where Federal and state law proscribe essentially the same offense, without contravening the Fifth Amendment prohibition against double jeopardy. (Recall Federal and state prosecutions re: Oklahoma City Bombing) Two relevant factors regarding law enforcement responsibility for a given incident are:

1. The capability and willingness of state or Federal authorities to act
2. The importance of the state or Federal interest sought to be protected under the criminal statute.

MILITARY INSTALLATION COMMANDER'S RESPONSIBILITIES

PDD-39 directs federal agencies to ensure that the people and facilities under their jurisdiction are protected against terrorism. This applies to DoD facilities both abroad and in the U.S. In response to a Downing Assessment Task Force recommendation concerning the Khobar Towers bombing, DoD and the State Dept. are reviewing their responsibilities to protect U.S. military and personnel assigned overseas.

Domestic Incidents. Although the FBI has primary law enforcement responsibility for terrorist incidents in the United States (including its possessions and territories), installation commanders are responsible for maintaining law and order on military installations. Contingency plans should address the use of security force to isolate, contain, and neutralize a terrorist incident within the capability of installation resources. In the United States, installation commanders will provide the initial and immediate response to any incident occurring on military installations to isolate and contain the incident. The FBI will take the following steps:

1. The senior FBI official will establish liaison with the command center at the installation. If the FBI assumes jurisdiction, the FBI official will coordinate the use of FBI assets to assist in resolving the situation; e.g., hostage rescue team, public affairs assets.
2. If the FBI assumes jurisdiction, the Attorney General will assume primary responsibility for coordinating the Federal law enforcement response.
3. If the FBI declines jurisdiction, the senior military commander will take action to resolve the incident.
4. Even if the FBI assumes jurisdiction, the military commander will take immediate actions as dictated by the situation to prevent loss of life or to mitigate property damage before the FBI response force arrives.
5. In all case, command of military elements remains within military channels.
6. Response plans with the FBI and Service agencies should be exercised annually at the installation and base level to ensure the plans remain appropriate.

Foreign Incidents. For foreign incidents, the installation commander's responsibilities are the same as for domestic incidents—with the added requirement to notify the host nation and DoS. Notification to DoS is made at the combatant commander level. In all AORs, existing contingency plans provide guidance to the installation commander regarding notification procedures. DoS has the primary responsibility for dealing with terrorism involving Americans abroad. The installation's response is also subject to agreements established with the host nation. Such agreements, notwithstanding, the Standing Rules of Engagement (CJCS Instruction 3121.01A), make it clear that the commander retains the inherent right and obligation of self-defense even in such situations.

The response to off-installation foreign incident is the sole responsibility of the host nation. U.S. military assistance, if any, depends on the applicable status-of-forces agreement (SOFA) or memorandum of understanding (MOU) and coordination through the U.S. embassy in that country. Military forces will not be provided to host-nation authorities without a directive from the Department of Defense that has been coordinated with DoS. The degree of DoS interest and the involvement of U.S. military forces depend on the incident site, nature of the incident, extent of foreign government involvement, and the overall threat to U.S. security.

VARIOUS ISSUES REGARDING THE CURRENT WAR ON TERRORISM

This portion of the chapter relates solely to some of the issues highlighted by the conflict in Afghanistan. This section does not specifically address any past or potential future issues involving the war on terrorism. It should be noted that the issues regarding the present operation in Afghanistan are very fluid and therefore subject to change. These issues addressed in this section are meant to highlight some of the recurring questions received at TJAGSA.

Legal Basis for Military Use of Force in Afghanistan. Self Defense under the UN Charter, Article 51. Although neither UNSCR 1368 (12 Sep 01) nor UNSCR 1373 (28 Sep 01) expressly authorize the use of force against the terrorists, both resolutions recognize the United States' "inherent right of self-defense".

Application of LOAC. As a matter of U.S. policy, DoDD 5100.77, *DoD Law of War Program* states the U.S. armed forces must "comply with the law of war during all armed conflicts, however such conflicts are characterized, and with the principles and spirits of the law of war during all other operations."

Status of Enemy Participants in Conflict. Unlawful Combatants. Taliban and al-Qaida lack some or all of the four attributes specified in Article 4, GC III, thus they are unlawful combatants. (See January 22, 2002 NSC statement of U.S. policy regarding al-Qaida and Taliban detainees).

Status of Detainees in Guantanamo Bay. The White House statement released on February 7, 2002 resolved this issue. The President determined that neither Taliban nor al-Qaida detainees are entitled to POW status. The President confirmed that the Geneva Conventions do apply to the Taliban detainees, but not to the al-Qaida detainees. In regards to the al-Qaida detainees, al-Qaida is not a state party to the Geneva Convention, it is a foreign terrorist group. Its members are therefore not entitled to the protections of the Geneva Convention. In regards to the Taliban detainees, although Afghanistan is a party to the Geneva Convention and the Geneva Conventions apply to the Taliban detainees, the Taliban detainees are not entitled to POW status because they do not satisfy the four conditions specified in Article 4, Geneva Convention Relative to the Treatment of Prisoners of War. The White House position is that the Taliban have not effectively distinguished themselves from the civilian population of Afghanistan and they have not conducted their operations in accordance with the laws and customs of war. Although the Taliban and al-Qaida detainees are not entitled to POW status, the United States "has treated and will continue to treat all Taliban and al-Qaida detainees in Guantanamo Bay humanely and consistent with the principles of the Geneva Convention.

Military Commissions. On November 13, 2001, the President signed an order authorizing the creation of military commissions to try certain individuals. Individuals subject to the order include members of al-Qaida, those who have engaged in, aided or abetted, or conspired to commit acts of international terrorism that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, or its citizens, or to have knowingly harbored such individuals. The President will decide who is subject to the order on a case-by-case basis. On March 21, 2002, SECDEF issued Military Commissions Order No. 1, which contains the rules and procedures for the military commissions. Specifically:

- SECDEF or a designee may issue orders appointing one or more military commissions.
- Offenses triable by the military commissions will be violations of the law of war.
- An Appointing Authority (AA) will appoint at least three but no more than seven members to the Commission.
- The members must be commissioned officers of the U.S. armed forces including reserve personnel on active duty, National Guard on active duty in Federal service, and retired personnel recalled to active duty.
- The Presiding Officer shall be a Military Officer who is a judge advocate.

- The Presiding Officer admits or excludes evidence, subject to override by a majority of Commission members.
- The Chief Prosecutor shall be a judge advocate.
- A military judge advocate shall be detailed by the Chief Defense Counsel (also a military judge advocate) to represent each accused.
- The Accused may retain the services of a civilian counsel of his choosing, at no expense to the government, provided certain requirements are met.
- The Accused shall be presumed innocent until proven guilty beyond a reasonable doubt.
- The Accused may not be compelled to testify or present evidence against himself.
- The Accused may be present at every stage of the trial (except proceedings closed by the Presiding Officer), unless the Accused engages in disruptive conduct that justifies exclusion.
- Detailed military defense counsel may not be excluded from any trial proceedings or portion, thereof.
- The Accused shall be afforded a trial open to the public, except proceeding closed by the Presiding Officer.
- The Accused may plead guilty and may enter a plea agreement with the government.
- Opening statements, presentation of evidence, and closing arguments on findings and, if appropriate, sentence are generally consistent with U.S. court-martial practice.
- The Rules for Courts-Martial and the Military Rules of Evidence do not apply.
- A two-thirds vote is required for a finding of guilty.
- A two-thirds vote is required to determine sentence, except that a sentence of death requires a unanimous vote.
- Upon conviction, the Commission shall impose an appropriate sentence, which may include death, life imprisonment or other lawful punishment.
- Only a Commission of seven member may sentence an accused to death.
- Acquittals are final once the Presiding Officer authenticates the record of trial.
- After the Presiding Office authenticates the record of trial, it is forwarded to the AA.
- If SECDEF is not the AA, the AA administratively reviews the record of trial and forwards to the Review Panel.
- The review Panel consists of three Military Officers, which may include civilian members commissioned by the President under Title 10, section 603. At least one member must have experience as a judge.
- If no material error of law, the Review Panel forwards the case with recommendations to SECDEF.
- After review, SECDEF remands the case for further proceedings or forwards the case to the President for final decision, unless the President has authorized SECDEF to render the final decision.

- Once the President or SECDEF makes a final decision, DoD ensures the sentence (if approved) is carried out promptly.

